Date: December 28, 1998

IN THE MATTER OF:

George Howlett,
Complainant

Case No. 1999-ERA-1

v.

File No. 1-0280-98-028

Northeast Utilities/
Northeast Nuclear Energy Corp.,
Respondent

For the Complainant:
Scott W. Sawyer, Esq.

For the Respondent:
Paul J. Zaffuts, Esq.

Before:
David W. DiNardi
Administrative Law Judge

RECOMMENDED ORDER OF DISMISSAL

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. §5851 (hereinafter "the Act" or "the ERA"), and the implementing regulations found at 29 C.F.R. Part 24. Pursuant to the Act, employees of licensees of or applicants for a license from the Nuclear Regulatory Commission (hereinafter "the NRC") and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. This Recommended Order of Dismissal is being issued based on documents of record submitted by the parties, marked for identification purposes as Administrative Law Judge exhibits.

Exhibit No.	Document	Date Filed
ALJ EX 1	Letter of Referral from the Occupational Safety and Health Administration dated June 29, 1998, with Letter of Determination to each party enclosed	07/01/98
ALJ EX 2	Notice of Appeal dated October 9, 1998 from Complainant's counsel	10/13/98
ALJ EX 3	Certified Mail receipts signed by Complainant and his counsel	10/16/98
ALJ EX 4	Order to Show Cause	10/21/98
ALJ EX 5	Complainant's Request for Additional Time within which to Respond to the Order to Show Cause	10/21/98
ALJ EX 6	Order Granting the request	10/21/98
ALJ EX 7	Complainant's Response to the Court's Order to Show Cause	11/11/98
ALJ EX 8	Respondent's Request for time to reply to Complainant's Response	11/24/98
ALJ EX 9	Order Granting the request	11/24/98
ALJ EX 10	Respondent's Reply to Complainant's Response to Order to Show Cause	12/03/98

Discussion

By Letter of Determination dated June 29, 1998, the Hartford, Connecticut office of the Occupational Safety and Health Administration (OSHA) notified the Complainant and his counsel of

the result of its investigation. (ALJ EX 1)[1] The letter also informed the Complainant and his counsel of the right to appeal the findings, to request a formal hearing and the time within which to do so.

By letter dated October 9, 1998, the Complainant's counsel requested a hearing before an administrative law judge. (ALJ EX 2) In that letter, counsel attested that although a newly retained employee of his office received the Letter of Determination by certified mail on July 1, 1998, Complainant's counsel did not see it until October 7, 1998 due to the misfiling of the document. (ALJ EX 3) According to the certified mail return receipt, the Complainant received the Letter of Determination by certified mail on June 30, 1998. (ALJ EX 3)

On October 21, 1998, this Judge issued an *Order to Show Cause* as to why the appeal should not be dismissed as untimely filed. (ALJ EX 4) The governing regulation provides that

> (2) The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination... If a request for hearing is not timely filed, the notice of determination shall become the final order of the Secretary.
> (3) ...A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service...

29 C.F.R. 24.4(d)(2-3).[2] The ERA requires that both a complainant and his attorney receive notice of OSHA's determination. 42 U.S.C. §5851(b)(2)(A).

Complainant's counsel argued that the undersigned should equitably toll the five day requirement because the delay was caused by a clerical error. The precedent relied upon by counsel, however, is wholly inapposite to the disposition of this case. **See Ward v. Bechtel Const., Inc.**, 85-ERA-9 (Sec'y 07/11/86) (dismissing the complaint as untimely filed and noting that the complainant did not seek any relief on grounds of mistake, inadvertence, excusable neglect or any other reason); **Shelton v. Oak Ridge Nat'l Lab.**, 95-CAA-19 (ALJ 08/02/95) (denying request for default judgment where the respondent's clerical mistake of serving all parties, but not the Office of Administrative Law Judges, resulted in no prejudice to the complainant or any other party, all of

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[1]In his *Response to the Court's Order to Show Cause*, Complainant's counsel argued that the Court should disagree with OSHA's findings. This Judge notes that upon receipt of a timely appeal, a hearing before an administrative law judge is conducted *de novo*. **Greenhorn v. Arrow Stage Lines**, 97-STA-18 (ARB 08/20/98); **Majors v. ASEA Brown Boveri, Inc.**, 96-ERA-33, at n. 1 (ARB 08/01/97).

[2]The Complainant cited outdated regulations in his *Response to the Court's Order to Show Cause*. The complaint was dated May 28, 1998 and, therefore, the regulations which became effective March 11, 1998 are applicable. **See** 63 Fed. Reg. 6614 (Feb. 9, 1998).

whom proceeded as if the appeal had been filed with the OALJ); **Daugherty v. General Physics Corp.**, 92-SDW-2 (Sec'y 04/19/95) (ALJ 12/14/92) (dismissing the complaint on the grounds that the complainant had neither pled nor presented sufficient facts to establish a prima facie claim).

The Complainant, relying upon the administrative law judge's order in **Daugherty**, stresses that the whistleblower employee protection statutes are not to be given narrow hypertechnical readings. The Complainant argued that "In **Daugherty**, the ALJ found improper dismissal of a complaint when the Complainant acted in substantial compliance with the regulations, and because employee protection statutes are not to be given narrow hypertechnical readings." See Response, at p. 3. The above-summarized analysis in the **Daugherty** case, however, was applied to the issue of whether or not the Complainant's filing of an appeal by letter, rather than telegram, was sufficient notice pursuant to the regulation then in effect. In regards to the timeliness issue presented in that case, the ALJ held that complainant timely filed his appeal with the Chief Administrative Law Judge.

The Administrative Review Board has held that the law is clear that the time limitation period for filing an appeal in a whistleblower action is to be strictly construed unless a complainant can demonstrate the right to avail him or herself of equitable tolling. **See Generally Degostin v. Bartlett Nuclear, Inc.,** 98-ERA-7 (ARB 05/04/98); **Staskelunas v. Northeast Utilities Co.**, 98-ERA-7 (ARB 05/04/98); **Backen v. Entergy Operations, Inc.**, 95-ERA-46 (06/07/96). The principal tolling exceptions, which are demonstrative and not exclusive, are (1) where the employer has concealed or misled the employee; (2) where the employee was prevented from asserting his rights in some extraordinary way; or (3) where the employee raised the precise statutory claim in the wrong forum. **Backen**, **supra**, at n. 5 (**citing School District of City of Allentown v. Marshall**, 657 F.2d 16, 19-20 (3rd Cir. 1981)). **See Also Crosier v. Westinghouse Hanford, Co.**, 92-CAA-3 (Sec'y 01/12/94), **recon. denied**, (Sec'y 12/08/94). The Secretary has noted that a complainant who received notice late because he was traveling fails to come within any exception, **Crosier**, **supra** (Sec'y 01/12/94), and that a complainant who seeks tolling based on ill health must show legal incapacity. **Ellis v. Ray A. Schoppert Trucking**, 92-STA-28 (Sec'y 09/23/92).

The Courts and the Secretary have indicated that equitable tolling is not appropriate where an employee was represented by counsel during the limitations period. **Keyse v. California Texas Oil Corp.**, 590 F.2d 45 (2d Cir. 1978); **Smith v. American President Lines, Ltd.**, 571 F.2d 102, 109 (2d Cir. 1978); **Hall v. EG&G Defense Materials, Inc.**, 97-SDW-9 (ARB 09/30/98); **McKinney v. Tennessee Valley Auth.**, 92-ERA-22 (Sec'y 11/16/93); **Mitchell v. EG&G**, 87-ERA-22 (Sec'y 07/22/93); **Tracy v. Consolidated Edison Co.**, 89-CAA-l (Sec'y 07/08/92). **Cf. Miriello v. Carolina Power and Light Co.**, 87-ERA-17 **Decision and Order to Show Cause** (Sec'y 01/23/92), **Order of Dismissal** (Sec'y 03/20/92) (holding complainant did not receive constructive notice through service to her attorney because the ERA requires notice to the complainant and her attorney, see 42 U.S.C. §5851(b)(2)(A), and because there was no attorney client relationship at the time the letter of determination was issued).

The Respondent, in urging that this case be dismissed because of Complainant's untimely filing of an appeal, relies upon the Supreme Court's decision in the matter of **Irwin v. Dept. of Veterans Affairs**, 498 U.S. 89, 93 (1990), **reh'g denied**, 498 U.S. 1075 (1991). The plaintiff in **Irwin** filed a race and physical disability suit; but, although both he and his attorney acknowledged receiving notice of the Equal Employment Opportunity Commission's final disposition of his claim, neither the plaintiff nor his attorney on his behalf filed a civil action within the thirty days permitted by statute. The Supreme Court denied the request to equitably toll the filing period based on the fact that plaintiff's lawyer was out of the office on travel at the time that the EEOC notice arrived and stated "the principles of equitable tolling...do not extend to what is at best a garden variety claim of excusable neglect." **Id.** at 96.

Respondent noted that the Supreme Court's decision in **Irwin** was cited by an administrative law judge in **McKinney v. Tennessee Valley Authority**, 92-ERA-22 (ALJ 03/17/92). The Secretary's final order, however, neither relied upon that case as legal precedent, **see Final Decision and Order** (Sec'y 11/16/93), nor rejected its application to an environmental whistleblower case. The **Irwin** case, however, was cited in **Spearman v. Roadway Express, Inc.**, 92-STA-1 (Sec'y 08/05/92). (case decided pursuant to the commercial trucking employee whistleblower statute). Therefor, this Judge deems **Irwin** an appropriate precedent to apply to the present claim.

In this case, both the Complainant and his attorney were sent the Letter of Determination by certified mail. Counsel attested that he received it on July 1, 1998 (ALJ EX 2), and Complainant received it on June 30, 1998. (ALJ EX 3) Neither Complainant nor his attorney timely exercised the right to appeal. The only explanation offered for the Complainant's failure to appeal was that he understood his attorney would respond appropriately to any correspondence. Complainant's attorney, however, did not appeal because his employee misfiled the certified letter. While this is regretful, it is not sufficient grounds to invoke the rarely exercised concept of equitable tolling. As the Second Circuit has opined, lack of due diligence on the part of a complainant or the complainant's attorney is insufficient to justify application of equitable tolling. **South v. Saab Cars USA, Inc.**, 28 F.3d 9 (2d Cir. 1994) (dismissing the complaint where plaintiff's counsel mistakenly relied on state procedure for filing of a federal complaint).

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DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jw

NOTICE: This Recommended Order of Dismissal will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. **See** 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).